1986

State of Utah v. Elias R. DeAlo : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 860232-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860232-CA
v.	:	
ELIAS R. DeALO,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF POSSESSION WITH INTENT TO DISTRIBUTE FOR VALUE A CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (1953) AS AMENDED, IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR SEVIER COUNTY, STATE OF UTAH, THE HONORABLE DON V. TIBBS, JUDGE PRESIDING.

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BRIEF OF RESPONDENT

JURISDICTION

This appeal is from a conviction of possession with intent to distribute a controlled substance, a second degree felony, after a trial in the Sixth District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1986).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does the defendant have standing to contest the search of the vehicle?

2. Did the trial court properly permit an instruction to go to the jury on aiding and abetting?

3. Did the trial court properly admit into evidence an affidavit and search warrant for a residence in California?

4. Did the trial court properly admit into evidence a dope ledger made by defendant?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The statutes pertinent to the issues raised on appeal are set forth in the body of the brief.

STATEMENT OF THE CASE

Defendant, Elia R. DeAlo, was charged with possession with intent to distribute for value a controlled substance, in a jury trial held May 19 and 20, 1986, in the Sixth Judicial District Court, in and for Sevier County, State of Utah, the Honorable Don A. Tibbs, Judge, presiding. Defendant was sentenced by Judge Tibbs on July 2, 1986, to not less than one year and not more than 15 years at the Utah State Prison, and fined in the amount of $10,000.00.

STATEMENT OF FACTS

On February 12, 1986 at about 5:15 p.m., Officer James D. Hillan of the Utah Highway Patrol stopped a vehicle for speeding (T. 71). Defendant and co-defendant Rafael Villa were in the car; defendant was driving (T. 71, 82-83, 168). After running a check through the Utah Highway Patrol computer, Officer Hillan received information that the car was registered to Antonio Villa of Flushing, New York (SHT 12-13, T. 84).[1] The report also indicated that there was a suspended status on the license plate (SHT 12, T. 84). Upon request, defendant produced a valid California driver's license; (T. 83) and co-defendant Villa, produced a New York driver's license (SHT 15). Co-defendant Villa also produced car registration showing Antonio Villa as the registered owner (SHT 14), and indicated that Antonio was his brother (SHT 16). Defendant indicated that the two men were on vacation, traveling from California to New York (T. 84, SHT 16).

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[1] The abbreviation "SHT" will be utilized to indicate the Supression Hearing Transcript.

The officer became suspicious based upon the appearance of the two men, the appearance of the car, the suspended status of the license plate, and the aroma from the car (T. 72). Officer Hillan asked if there were controlled substances in the car and defendant indicated there were none (T. 72). Officer Hillan then asked defendant if he would consent to a search of the vehicle (T. 72). Defendant readily consented (T. 85). Officer Hillan prepared a handwritten consent to search which defendant then signed (T. 73, 85).

Officer Hillan proceeded to search both the passenger compartment and the trunk of the car (T. 74). Upon looking in the trunk, Officer Hillan observed "a metal container fabricated into the vehicle to the front portion of the trunk," (T. 75, SHT 17, 22). Officer Hillan then removed the bottom portion of the back seat, revealing chrome plated hinges riveted to the floorboard of the vehicle (T. 76). At this point the search was suspended until a search warrant could be obtained to search the metal container (T. 77). When the officer opened the metal compartment he discovered five packages wrapped in duct tape (T. 79). Defendant denied any knowledge of the metal container and the contents in the container (SHT. 23, T. 176).

Analysis of the five wrapped packages determined that each of the packages contained cocaine (T. 92). Both defendant and co-defendant Villa were charged with possession with intent to distribute a controlled substance, under Utah Code Ann. § 58-37-8 (1953 as amended), (R. 1).

Prior to trial, defendant moved to suppress the evidence obtained as a result of the search (R. 31-32). Although defendant was not the owner of the searched vehicle, he argued that he had a proprietary and possessory interest in the car because it contained some of his personal belongings (SHT 8). However, at the time of the search defendant denied any knowledge of the metal container, and the five packages of cocaine within the container (SHT 23). After hearing arguments, the court found that defendant had no standing to contest the search (SHT 30).

After a two-day jury trial, defendant was found guilty of possession with intent to distribute a controlled substance.

SUMMARY OF ARGUMENT

Defendant lacks standing to contest the search of the vehicle. The fact that defendant was an invited guest in the vehicle coupled with his denial of the metal container in the trunk and the cocaine therein did not give defendant any legitimate expectation of privacy in the vehicle.

The trial court did not err in giving a jury instruction on aiding and abetting under Utah Code Ann. § 76-2-202 (1978). Since no facts exist to support an arrangement for a distribution by defendant, State v. Hicken, 659 P.2d 1038 (Utah 1983) is inapplicable in the present case, and defendant was properly charged with possession with intent to distribute a controlled substance for value.

An affidavit and search warrant for a California residence was properly admitted into evidence as non-hearsay. The exhibit was not admitted for the truth of the matter asserted

and was only necessary to lay a foundation for the testimony of the officer. Assuming the exhibit was hearsay, defendant has failed to establish any prejudice from the exhibit.

Finally, a dope ledger made by defendant was properly admitted into evidence. The evidence was not admitted to show a bad disposition on the part of the defendant, but instead was necessary to establish opportunity, knowledge and intent on the part of defendant.

ARGUMENT

POINT I

DEFENDANT LACKS STANDING TO CHALLENGE THE SEARCH OF THE VEHICLE.

Defendant alleges that he had a legitimate expectation of privacy in the vehicle searched. Specifically, defendant contends that he and co-defendant Villa had permission to use the car for a two week vacation, that defendant had a key to the area searched, and that defendant had made the automobile his temporary home.

Both defendant and the State agree tnat an individual has standing to object to the lawfulness of a search only if he has a "legitimate expectation of privacy" in the item or premises searched. Rakas v. Illinois, 439 U.S. 128 (1978). "A person who is aggrieved by an illegal search and seizure only through tne introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." Rakas, 439 U.S. at 134, citing Alderman v. United States, 394 U.S. 165, 174 (1969). The fact that the defendant may have been "legitimately on [the] premises"

such that he was in the car with the owner's permission does not determine whether he had a legitimate expectation of privacy in the particular areas of the automobile searched. Rakas, 439 U.S. at 148.

Further, "the proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." Rakas 439 U.S. 131 n. 1. In Rakas, the Court rejected the defendants' claim, "since they [the defendants] made no showing that they had any legitimate expectation of privacy" in the searched vehicle. Id. at 148. See also Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (the defendant must prove not only that the search was illegal, but also that he had a legitimate expectation of privacy in the object searched); United States v. Salvucci, 448 U.S. 83, 92 (1980) (no valid fourth amendment claim absent "a factual finding" that defendants had a legitimate expectation of privacy in the area searched); United States v. Erickson, 732 F.2d 788, 790 (10th Cir. 1984) (fourth amendment claim regarding search of airplane depended upon whether the defendant "sufficiently showed lawful possession or control to confer standing," and was dismissed because he had "failed to show lawful possession of the plane giving rise to a legitimate expectation of privacy"); United States v. Obregon, 748 F.2d 1371, 1375 (10th Cir. 1984) (no standing, because defendant did not prove that he had legitimate expectation of privacy in automobile); State v. Bottelson, 102 Idaho 90, ___, 625 P.2d 1093, 1095 (1981) ("defendant had the burden of proving that he had a legitimate

expectation of privacy in the Pontiac"); People v. Pearson, 190 Colo. 313, ___, 546 P.2d 1259, 1264 (1976) (to "establish standing to challenge a search and seizure, the challenger has the burden of alleging and proving that he has a reasonable expectation of privacy"); 3 W. LAFAVE, SEARCH AND SEIZURE § 11.3 (1978) ("The burden is on the defendant to show that he had lawful possession of the auto or was otherwise present therein).

This case, on the facts presented to the trial court, is indistinguishable from State v. Valdez, 689 P.2d 1334 (Utah 1984). There, a unanimous Court held that the defendant, who did not own the car which he was driving and which was the object of the search complained of, lacked standing to complain of the search which followed a stop made by police officers. In Valdez, like the present case, the defendant disclaimed any ownership rights in the car and the briefcase found in the car (SHT 21-23). It is clear from Valdez that mere possession of property, or presence therein or thereon, without some showing of a legitimate expectation of privacy in the effects searched is not enough to gain standing to challenge the search. Therefore, defendant who did not own the car (but was merely a passenger in a borrowed car) and did not show any legitimate expectation of privacy in that car (mere possession not being sufficient), lacks standing to challenge the search of the car and ultimate seizure of the

cocaine.[2] Valdez, 689 P.2d at 1335, citing State v. Purcell, 586 P.2d 441 (Utah 1978); Rakas v. Illinois, 439 U.S. 128 (1978). See also State v. Constantino, 732 P.2d 125 (Utah 1987) (absent claimed right to possession, defendant could not assert any expectation of privacy in the items seized and had no standing to object to the search).

Defendant relies upon several federal cases to support his argument that he had a legitimate expectation of privacy in the area searched (App. Br. 13-16). However, all of the cases are distinguishable from the present case. In one of the cases cited by defendant, United States v. Portillo, 633 F.2d 1313,1317 (9th Cir. 1980), cert. denied, 450 U.S. 1043, appeal after remand, 699 F.2d 461 the court there ruled that a passenger had no standing to challenge the search of a paper bag in the vehicle's trunk when the stop was lawful. See also McCraney v. State, 381 So.2d 102, 105-06 (Ala. Cr. App. 1980) (defendant, who was passenger in car lawfully stopped, lacked standing to challenge search).

In the other cases cited by the defendant the courts ruled that a defendant who received permission to use a vehicle

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[2] The State must concede that there is substantial authority contrary to Valdez on the question of whether a driver, who has the vehicle owner's permission to possess and drive it, has standing to challenge a search of the vehicle when a laeful stop is made. E.g., United States v. Portillo, 633 F.2d 1313, 1317 (9th Cir. 1980); United States v. Ochs, 595 F.2d 1247 (2d Cir. 1979), cert. denied, 444 U.S. 955; Stone v. State, 162 Ga. App. 654, 292 S.E.2d 525 (1982). However, in the instant case it was the co-defendant, not the defendant who had permission to use the vehicle. Defendant was merely a passenger in the vehicle, present only by invitation of Mr. Villa, the co-defendant.

from the owner had a legitimate expectation of privacy in the vehicle. However, in the instant case defendant nowhere asserts that he had direct permission from the owner to use the vehicle, instead defendant was merely a passenger in the vehicle. In fact, defendant continuously denied any acknowledgement of the secret compartment in the trunk and its contents (SHT. 21-23). Because defendant has failed to prove that he had a legitimate expectation of privacy in the vehicle, he is without standing to contest the search.

POINT II

BECAUSE STATE V. HICKEN IS INAPPLICABLE IN THE PRESENT CASE, THE TRIAL COURT DID NOT ERR IN GIVING A JURY INSTRUCTION ON AIDING AND ABETTING.

Defendant contends that it was error to give an instruction to the jury on aiding and abetting, pursuant to Utah Code Ann. § 76-2-202 (1978). Defendant relies upon Utah Code Ann. § 58-37-19 (1986) which provides that:

> It is the purpose of this act to regulate and control the substances designated within § 58-37-4, and whenever the requirements prescribed, the offenses defined or the penalties imposed relating to substances controlled by this act shall be or appear to be in conflict with Title 58, Chapter 17 or any other laws of this state, the provisions of this act shall be controlling.

In the present case defendant was charged with Utah Code Ann. §58-37-8(1)(a)(ii) (1986), possession of a controlled substance with intent to distribute. At trial, instructions on possession, and aiding and abetting, Utah Code Ann. §76-2-202 (1978), went to the jury. Defendant excepted to the instruction on the basis that if he assisted the co-defendant then he should

have been charged with arranging a distribution under Utah Code Ann. § 58-37-8(1)(a)(iv) (1986); State v. Hicken, 659 P.2d 1038 (Utah 1983); and State v. Scott, 732 P.2d 117 (Utah 1987).

Defendant's reliance upon Hicken and Scott is misplaced. In Hicken, the defendant arranged for an undercover agent to purchase drugs from a third party. Defendant was subsequently arrested and charged with distribution under Utah Code Ann. § 58-37-8(1)(a)(ii) (1953 as amended). Defendant successfully argued that since he did not actually distribute the drugs, he should have been charged with arranging, not distribution. The State argued that defendant would have been guilty of distribution under § 76-2-202, since defendant would have solicited, requested, commanded, encouraged or aided another person to engage in that criminal conduct. The Court ruled that an instruction on aiding and abetting should not have gone to the jury because "the Controlled Substance Act expressly and specifically sanctions the offense of arranging . . . [and] it thus displaces . . . the general sanction for aiding another provided for in in § 76-2-202 of the Criminal Code." Id. at 1040.

In State v. Scott, 732 P.2d 117 (Utah 1987) an informant purchased a bag of marijuana at the defendant's house. Because no one at trial could testify as to who handed over the marijuana and who took the money at defendant's home, the evidence admitted at trial left in doubt how the exchange of the marijuana and money took place. The Scott Court stated that "a

person cannot be charged with aiding and abetting another when he or she handles the negotiations and price of a controlled substance, but must instead be charged with agreeing, consenting, offering, or negotiating to distribute a controlled substance as specifically provided in § 58-37-8(1)(a)(iv)." Id. at 120. The Court also defined the offense of arranging as follows: "[t]he actus reus under section 58-37-8(1)(a)(iv) constitutes an act of agreement, consent, offer, or arrangement to distribute." Id. at 120.

Recently, the Utah Supreme Court defined the offense of arranging in State v. Benfro, 54 Utah Adv. Rep. 15 (March 24, 1987). There, the Court stated that one commited the crime of arranging when he discussed the purchase with officers, set a price for the marijuana, and agreed to make the exchange.

In Hicken and Scott the defendants were improperly charged with distribution. When it became clear at trial that defendants did not distribute, but instead arranged for the distribution of the drugs, the State then attempted to provide an instruction to the jury on aiding and abetting under § 76-2-202. However, Utah Code Ann. § 58-37-19 clearly provides that defendants had to be charged under the appropriate provision in the Controlled Substances act. Because a specific provision in the Controlled Substance act prohibited the offense of arranging, defendants should have been charged with violation of that provision and the instuction on aiding and abetting was improper.

In the instant case no facts exist to support a charge of arranging; there is no evidence in the record that defendant

discussed a purchase with anyone, set a price for the sale of the cocaine, or participated in the exchange of the drugs for money. See Renfro 54 Utah Adv. Rep. 15. Defendant was properly charged under § 58-37-8(1)(a)(ii) with possession with intent to distribute. The instruction on aiding and abetting was necessary only in the event the jury should find that it was the co-defendant who really owned the cocaine and defendant was merely assisting in the possession. If the jury had found defendant guilty of aiding under § 76-2-202 they still would have found defendant guilty of possession with intent to distribute since no facts existed to find defendant guilty of arranging. Contra State v. Scott, 732 P.2d 117 (Utah 1987).

POINT III

THE TRIAL COURT DID NOT ERR IN ADMITTING AN AFFIDAVIT AND SEARCH WARRANT FOR A CALIFORINIA RESIDENCE.

At trial the State called Detective Barfield, of the Los Angeles Police Department, to testify regarding items seized during a search of a residence in Southern California.[3] As foundation for his testimony the State introduced exhibit #11, an affidavit and search warrant for the search in California.

Defendant objected to the admission of exhibit #11 on several grounds, three of which he raises on appeal. First, defendant contends that the exhibit was hearsay and not admissible. Second, defendant complains that the evidence was

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[3] The items seized during the search include identification cards belonging to defendant (T. 131) and a handwritten document made by defendant (T. 132, exhibit 14) identified as a dope ledger (T.138).

inadmissible under Utah R. Evid. 404 (1986) as evidence of defendant's character. Finally, defendant argues that under Utah R. Evid. 403 (1986) the evidence should have been excluded because of its prejudicial effect. The State will first address whether the evidence was admissible.

It is well established that this Court should not "disturb the ruling of the trial court on the admissibility of evidence unless it clearly appears that the lower court was in error." State v. Gallegos, 712 P.2d 207, 209 (Utah 1985). The Utah Supreme Court has stated that "[t]he trial court's ruling on the admissibility of evidence will not be reversed absent a showing that the trial court so abused its discretion as to create a likelihood that injustice resulted." State v. Royball, 710 P.2d 168 (Utah 1985).

Exhibit #11 was properly admissible as non-hearsay evidence. Utah R. Evid. 801(c) (1986) provides that "hearsay is a statement . . . offered in evidence to prove the truth of the matter asserted." The Utah Supreme Court has stated that when " an out-of-court statement is offered only to prove that the statement was made, without regard to its truth of falsity, it is not proscribed by the hearsay rule. " State v. Hutchinson, 655 P.2d 635, 636 (Utah 1982).[4]

In the instant case the exhibit was offered to lay a foundation for the subsequent acts of the officer (T. 125-127). As the court stated:

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[4] While State v. Hutchinson, 655 P.2d 635 (Utah 1982), was decided under former rule 63, Utah Rules of Evidence (1973), the Committee Note to Rule 801 states that the present definition of hearsay is substantially similar to Rule 63.

> "it [the search warrant] has a purpose because it becomes a foundation for his testimony . . . [t]he State is contending that based on a search warrant issued out of a Court of record in California, the search was made and certain things were found . . . I think that the State is certainly entitled to show the legality of the action the officers took in order to reach the testimony that they're going to give."

(T.125-127). The truth of the search warrant and affidavit was not an issue at trial. It was merely offered to show tnat the officer legally searched the California residence.

Even assuming the offered evidence was hearsay and should not have been admitted, defendant has failed to prove any prejudice. Utah R. Evid. 103 (1986) provides in part that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . ." Error is reversible only if a review of the record persuades the court that without the error there was "a reasonable likelihood of a more favorable result for the defendant." State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984).

No where in neither the search warrant nor the affidavit is any reference made to defendant (see exhibit #11). Further, defendant even admited at trial that he was not named in either the warrant or the affidavit (T. 120). While the subsequent testimony by Officer Barfield was certainly damaging to defendant, the exhibit itself was not prejudicial and only laid foundation for the testimony.

Defendant next claims the evidence should have been excluded under Utah R. Evid. 403 and 404(b) (1986). Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Both rules are inapplicable to the present case. Because neither the affidavit nor the warrant mentions defendant, they could not logically hurt his character under Rule 404. Further, because defendant has failed to establish any prejudice, Rule 403 is inapplicable.

If defendant has any argument with regard to the admissibility of exhibit #11 it may be one of relevancy since the document fails to mention defendant. However, since defendant does not raise this issue it does not merit discussion. Cf. State v. Fulton, Utah, No. 20191, slip op. n. 16 at 15-16 (1987) (Defendant challenged testimony on competency grounds and Court found that it was not an issue. The Court stated that had defendant challenged the reliability of the testimony the Court may have been willing to review it, but since it was not raised it did not merit discussion).

POINT IV

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE A DOPE LEDGER MADE BY DEFENDANT

Defendant contends that exhibit #14 containing handwritten documents made by him should have been excluded under Utah R. Evid. 404(b) (1986), and Utah R. Evid. 403 (1986).

At trial, detective Barfield testified that during the search of the California residence named in the search warrant, a handwritten document, exhibit #14, was discovered (T. 132). Agent La Suis', an agent with the Drug Enforcement Administration Department of Justice, testified that exhibit #14 was a dope ledger containing information of deliveries of drugs to buyers (T. 138). Defendant testified that exhibit #14 contained his handwriting, and that he made the entries in the document at the request of a third party (T. 177-78).

The Utah Supreme Court has ruled that it will not interfere with the trial court's ruling on evidentiary matters unless it clearly appears that the court so abused its discretion that there is a likelihood that injustice resulted. State v. McClain, 706 P.2d 603, 604 (Utah 1985). The relevancy of evidence admitted under Rule 404 is within the discretion of the trial judge. State v. Tanner, 675 P.2d 539 (Utah 1983)[5]

Utah R. Evid. 404(b) provides that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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[5] Tanner cites to Rule 55, Utah R. Evid. (1971) which is substantively the same as Utah R. Evid. 404 (1986).

"While evidence of other bad acts is inadmissible to show the general disposition of the defendant, such evidence, when relevant and competent, is admissible to prove a material fact." State v. Shaffer, 725 P.2d 1301, 1307 (Utah 1986) citing State v. Tanner, 675 P.2d 539, 546 (Utah 1983). See also State v. Forsyth, 641 P.2d 1172 (Utah 1982).

In the instant case, the evidence was not offered to show a bad disposition on the part of defendant. The State had the burden to prove that defendant possessed the cocaine with the intent to distribute it for value. Defendant had filed a document in court denying any knowledge of the cocaine or of any drug transactions (T. 63, 103).[6] Thus, the State was put to the task of proving that defendant possessed the requisite intent to commit the crime with which he was charged. The exhibit admitted did not contain any evidence of arrests or convictions of defendant for other crimes, instead the evidence was merely a drug ledger kept by defendant of drug transactions conducted by defendant in California. In light of defendant's contention that he was unaware of any drug transactions, the evidence was relevant and necessary to prove defendant's opportunity to possess the cocaine, defendant's knowledge of a major distribution scheme, and the intent to participate in that scheme.

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[6] Defendant moved for a severance of his case from co-defendant, Villa's case on the ground that defendant intended to testify at trial that he had no knowledge of cocaine in the vehicle, and further, that he had never been involved in any type of drug trafficking (R. 44, T. 103).

Defendant argues that exhibit #14 may have been properly admissible as rebuttal evidence to impeach the credibility of defendant, however, it should not have been admitted during the State's case in chief. First, the State had the burden to prove defendant possessed the requisite intent to commit the crime with which he was charged. Second, defendant had filed documents with the court indicating that he planned to testify that he was unaware of the cocaine in the car. He also argued at the suppression hearing that he did not own the vehicle containing the cocaine and was unaware of any drugs in the vehicle. Thus, the State was put on notice that defendant would be claiming lack of knowledge regarding the cocaine and it would be necessary for the State to connect defendant to the cocaine.

Defendant next argues that assuming the evidence was admissible, it should have been excluded because of the prejudicial effect on defendant's case.

Under Rule 104(a), Utah R. Evid. (1986) it is the trial court's responsibility to determine any preliminary questions concerning the admissibility of evidence. Rule 403, Utah R. Evid. (1986), states several reasons for which a court may decide not to admit relevant evidence. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

These two rules place the exclusion of unfairly prejudicial evidence within the discretion of the trial court. It is not

mandatory that the court exclude all unfairly prejudicial evidence; the rule merely allows that the court may exclude such evidence "if its probative value is substantially outweighed by the danger of unfair prejudice."

The admission of evidence under Rule 403 is a matter addressed to the sound discretion of the trial court, and a trial court's decision to admit evidence will not be overturned absent an abuse of discretion. State v. Garcia, 663 P.2d 60, 64 (Utah 1983); State v. Cloud, 722 P.2d 750 (Utah 1986).

In the instant case, this Court should not interfere with the trial court's decision to allow the document into evidence unless the trial court so abused its discretion that there is a liklihood of injustice.

Although the admission of the exhibit may have created some danger of prejudice, it was not substantially outweighed by the danger of undue prejudice. State v. McClain, 706 P.2d 603 (Utah 1985). The jury was entitled to examine the document because "[t]he jury is entitled to know the truth of the situation in order to arrive at a just verdict." State v. Danker, 599 P.2d 518, 519 (Utah 1979).

CONCLUSION

Based upon the foregoing, the State requests this Court to atfirm defendant's conviction.

DATED this 10 day ot June, 1987.

DAVID L. WILKINSON
Attorney General

Kimberly K. Hornak

KIMBERLY K. HORNAK
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that four true and accurate copies of the foregoing Briet of Respondent were mailed, postage prepaid, to Marcus Taylor, Labrum & Taylor, 108 North Main Street, P.O. Box 724, Richfield, Utah 84701, this 10 day of June, 1987.

Kimberly K. Hornak